

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CURTIS ALLEN,	§	
	§	No. 699, 2009
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0304014526B
Appellee.	§	

Submitted: May 28, 2010
Decided: August 12, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 12th day of August 2010, upon careful consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) The appellant, Curtis Allen, filed this appeal from the Superior Court’s November 18, 2009 denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). We conclude that there is no merit to the appeal. Accordingly, we affirm the Superior Court’s judgment.

(2) The record reflects that Allen was tried in May 2004 on multiple charges of rape, attempted rape and robbery. The charges involved three women and arose from three separate incidents occurring in 2002 and

2003 in the vicinity of the Wilmington bus and train stations.¹ Allen's defense at trial was that he had consensual sex with each of the women after buying and/or consuming drugs with them.

(3) The evidence at trial included expert testimony that Allen's DNA profile matched the profile of sperm obtained from vaginal swabs collected from each of the women. In two of the women, identified herein as Victim A and Victim B, the only DNA found, other than their own, belonged to Allen.² In the case of the third woman, Victim C, sperm from another contributor was collected from her underwear.

(4) Allen's jury trial resulted in guilty verdicts with respect to Victim A and Victim B. Allen was acquitted with respect to Victim C. On direct appeal, this Court affirmed Allen's convictions.³

(5) On October 14, 2009, Allen filed a *pro se* motion for postconviction relief.⁴ Allen argued that his defense counsel had a disqualifying conflict of interest and was otherwise ineffective.

¹ Charges arising from a fourth incident involving a juvenile male were severed by the Superior Court and resolved by a plea agreement.

² In this decision, the Court has referred to the three women as Victim A, Victim B, and Victim C, consistent with the pseudonyms assigned by the Court in its decision on Allen's direct appeal.

³ *Allen v. State*, 953 A.2d 699 (Del. 2005). On direct appeal, Allen challenged only the sufficiency of the jury instructions.

⁴ Allen filed related motions for transcripts, "to compel," and for expansion of the record.

(6) The Superior Court referred Allen’s postconviction motion to a commissioner for proposed findings and recommendations. Finding that Allen’s assertions were “based upon conjecture and innuendo,” the commissioner did not reach the merit of Allen’s claims. By report dated November 3, 2009, the commissioner recommended that Allen’s motion should be summarily dismissed as procedurally barred.

(7) By order dated November 18, 2010, having received no objection to the commissioner’s report and after reviewing the record *de novo*, the Superior Court denied Allen’s postconviction motion “for reasons stated in the Commissioner’s Report and Recommendation.” This appeal followed.

(8) In a postconviction proceeding, the Superior Court must first consider whether the procedural requirements of Rule 61(i)⁵ have been met before addressing the merits of the movant’s claims.⁶ In this case, as determined by the Superior Court, Allen’s claims are both time-barred under Rule 61(i)(1)⁷ and procedurally defaulted under Rule 61(i)(3).⁸ Allen

⁵ See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief).

⁶ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁷ See Del. Super. Ct. Crim. R. 61(i)(1) (barring postconviction motion filed more than three years after judgment of conviction is final) (amended 2005 to reduce limitations period to one year for conviction final after July 1, 2005). Allen’s conviction became final in March 2005. His postconviction motion was filed in October 2009.

⁸ See Del. Super. Ct. Crim. R. 61(i)(3) (barring any ground for relief that could have been raised in a prior proceeding but was not).

argues, however, that his claims should be considered under Rule 61(i)(5), which renders the procedural bars inapplicable to colorable claims of a miscarriage of justice because of a constitutional violation.⁹

(9) In his conflict of interest claim, Allen argues that his counsel, an assistant public defender, was disqualified from representing him because the Office of Public Defender previously represented another suspect who was initially charged in the rape of Victim C.¹⁰ According to Allen, this dual representation impeded his defense at trial because his counsel could not argue the other suspect's guilt to the jury.

(10) In his ineffective assistance of counsel claim, Allen argues that his counsel was ineffective when he failed to impeach the police officers' handling and processing of certain forensic evidence and when he failed to retain a defense expert to conduct additional testing. According to Allen, "the methods the police used to collect evidence created a severe risk of evidence contamination."

(11) An application for postconviction relief alleging a successful conflict of interest claim must specifically identify the nature of the alleged

⁹ See Del. Super. Ct. Crim. R. 61(i)(5) (excepting application of procedural bar to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the proceedings leading to the judgment of conviction).

¹⁰ The charge against that suspect, Calvin Munce, was dismissed by the State on March 18, 2003. *State v. Munce*, Del. Super., Cr. ID No. 0209004470.

conflict and make a concrete showing of actual prejudice, *i.e.*, that “an actual conflict of interest adversely affected [the] lawyer’s performance”¹¹ Similarly, an application for postconviction relief alleging a successful claim of ineffective assistance of counsel must demonstrate that the attorney’s representation fell below an objective standard of reasonableness and that, but for the deficient representation, the result of the proceedings would have been different, *i.e.*, that the deficient representation prejudiced the defense.¹²

(12) Under the circumstances of this case, Allen cannot show that he was prejudiced by the Office of Public Defender’s prior representation of the other suspect initially charged in the rape of Victim C. Allen was acquitted in the rape of Victim C, and there is no basis in the record to suggest that the other suspect committed any of the offenses against Victim A and Victim B.¹³ Moreover, with nothing more than speculation to support his claim that the police mishandled forensic evidence, and in view of the other evidence corroborating his guilt, Allen cannot show that he was prejudiced as a result

¹¹ *Lewis v. State*, 757 A.2d 709, 718 (Del. 2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). *Accord Hitchens v. State*, 2007 WL 2229020 (Del. Supr.); *State v. Ward*, 1991 WL 302635 (Del. Super.), *aff’d*, 1992 WL 115185 (Del. Supr.).

¹² *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹³ *But cf. Lewis v. State*, 757 A.2d 709 (Del. 2000) (holding that there was an actual conflict of interest in the dual representation of defendant and codefendant at trial by the same assistant public defender when the strength of the state’s case against the codefendant undermined the jury’s assessment of the defendant’s alibi defense).

of his counsel's failure to impeach the police officers and to retain a defense expert.

(13) The Court concludes that Allen's motion for postconviction relief was properly denied as time-barred under Rule 61(i)(1) and procedurally defaulted under Rule 61(i)(3). Allen's claims are based on unsupported factual assertions that do not entitle him to relief under Rule 61(i)(5).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice